FILED

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OFFICE OF THE CLERK

Docket No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARCANGELO COTOIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARCANGELO COTOIA'S PETITION FOR A WRIT OF CERTIORARI

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2188

QUESTION PRESENTED

1. Whether the United States District Court for the Southern District of New York lacked jurisdiction pursuant to 18 U.S.C. Section 666.

LIST OF PARTIES

All parties appear in the captions of the case on the cover page.

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DATE OF OPINION AND ORDER BELOW

On May 23, 1997, the Court of Appeals for the Second Circuit issued an unpublished summary order affirming defendant's conviction of violation of 18 U.S.C. Section 371 and 18 U.S.C. Section 666 (a). This summary order is reproduced in the Appendix to this petition. On August 21, 1997 an Order was issued denying a petition for rehearing with a suggestion for rehearing en banc. This Order is reproduced in the Appendix. On September 11, 1996 petitioner's motion to stay the issuance of the mandate of Court of Appeals was granted.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18 U.S.C. Sec. 666:

> (a) Whoever, if the circumstances described in section (b) of this section exists . . .
>
> (1) being an agent of an organization, or of a State, local, or Indian tribunal government, or any agency thereof . . .
>
> (A) . . .
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government or agency involving anything of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with the intent to influence or reward an agent of an organization or

of a State, local or Indian tribunal government, or any agency thereof, in connection with any business transactions of such organization, government or agency involving anything of value of $5,000 or more:

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

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MARCANGELO COTOIA'S PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In or about 1990, the Federal Bureau of Investigation (the "FBI"), joined by the Inspector General's Office of the Department of Sanitation for the New York City Department of Investigation (the "Inspector General's Office"), began an investigation into allegations of bribery of Department of Sanitation (the "DOS") inspectors at the Fresh Kills Landfill in Staten Island New York (the "Landfill"), and the unlawful distribution of DOS dump tickets.

The indictment alleged that "at all relevant times the DOS was an agency of the City of New York ("City"), which received in excess of $10,000 in Federal assistance." "Among the duties and responsibilities of the DOS were the following: the collection, recycling and disposal of the City's residential solid waste, the cleaning of the City's streets; the removal of snow and ice from the streets; the cleaning of vacant lots; and the building and maintenance of facilities to carry out these responsibilities."

The Landfill receives approximately 95% of the waste picked up by the DOS, including waste generated by private residences, and a portion of the commercial waste generated in NYC, which is usually picked up by private carting companies. To safeguard against environmental and health hazards, and to build temporary roads which would lead to active dump areas, it was required that waste deposited at the Landfill be covered with inert material. The inert material is known as "cover material," and consists of "clean fill."[1] The bribery scheme at issue allegedly operated in the execution of the "paid cover" and "free cover"[2] programs by which the DOS procured cover material for use at the Landfill.

Generally, trucks bringing garbage or construction and demolition material to the Landfill, as opposed to cover material, were required to pay dumping fees to the City of $40 per cubic yard. However, and as explained more fully in the Indictment, no fees were charged to dump material under the "paid" and "free" cover programs.

> '. . . under the paid cover program, the City obtained cover material by contracting with suppliers to buy a predetermined number of cubic yards of cover material to be delivered from pre-approved

---

[1] "'Clean fill' refers generally to material made up primarily of clean dirt, with some small amounts of stone, gravel, sand, clay and silt."

[2] The "free cover" program is also referred to as the "inter-agency cover program".

> cites. The paid cover contracts requires the supplier to deliver a minimum number of cubic yards of cover material to the Landfill each operating day during the term of the contract. The paid cover contracts also imposed a ceiling on the number of cubic yards of cover material that were to be delivered to the Landfill.'
>
> * * *
>
> '. . . the free cover program was a program under which contractors and truckers were permitted to dispose of cover material at the Landfill from pre-approved sites, free of charge. Under the free cover program, "road material" was also accepted from contractors and truckers free of charge at the Landfill, provided that it originated from pre-approved sites. . . .'

According to the Government "[t]he defendants paid . . . bribes both directly to DOS employees who worked at the landfill and indirectly by giving money to the Emmino brothers, who kept a percentage and paid the rest to DOS employees who worked at the Landfill." The Emmino brothers, Anthony and Robert, were unindicted co-conspirators, who were the President and vice-president, respectively, of CJE Land Clearing Inc.

Specifically it was alleged that, petitioner Marcangelo Cotoia, a "customer" of CJE, paid CJE "between approximately $200,000 and $250,000, with the understanding that the Emmino brothers would and did pay a portion of that money in bribes to DOS employees. . ." In exchange for the bribes, the DOS employees permitted CJE's customers "to dump unapproved material, including construction and demolition debris, at the Landfill, under the guise of the free cover program, without paying the required $40 per cubic yard dumping fee." "As a result, the defendants received substantial financial benefits to which they were not entitled in the form of dumping fees saved, and the City was defrauded out of substantial revenue to which it was entitled."

A final judgment of the United States District Court, Southern District of New York (Hon. John S. Martin, U.S.D.J.) was filed on January 5, 1996, convicting Marcangelo Cotoia of conspiracy to commit bribery (18 U.S.C Sec. 371); and bribery (18 U.S.C. Sec. 666(a)), and sentencing him under the United States Sentencing Guidelines to the custody of the Bureau of Prisons for thirty three months, to be followed by three years' supervised release. No fine or restitution was imposed upon petitioner. The Court stayed execution of judgment pending appeal and petitioner was continued on the same bail conditions previously set by the Court.

A timely notice of appeal was filed on petitioner's behalf at the Clerk's Office, United States District Court, Southern District of New York on August 7, 1996.[3] By Summary Order entered May 23, 1997, the United States Court of Appeals for the Second Circuit affirmed petitioner's conviction. The Order of the Court of Appeals appears in the Appendix at A-1.

Thereafter, a petition was submitted for rehearing with a suggestion for rehearing en banc. On August 21, 1997, the petition was denied. The Order of the Court of Appeals denying the petition appears in the Appendix at A-5.

On September 11, 1996 petitioners motion to stay the issuance of the mandate of the Court Appeals was granted. Petitioner remains at liberty. A-6.

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[3] As a result of several adjournments, Defendant was sentenced on August 1, 1996.

ARGUMENT

I. THE OPINION OF THE SECOND CIRCUIT COURT OF APPEALS APPLIES THE FEDERAL BRIBERY STATUTE IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AS WELL AS ITS OWN RELEVANT DECISIONS, WHICH HAVE FOUND THE TYPE OF PROSECUTION AT ISSUE HERE TO BE OUTSIDE THE SCOPE OF 10 U.S.C. SECTION 666.

The Second Circuit Court of Appeals' decision affirming petitioner Marcangelo Cotoia's conviction is flawed in that it disregards the essential jurisdictional elements and requirements of 18 U.S.C. Section 666; it ignores a series of Courts of Appeal decisions, which consistent with the congressional intent in enacting section 666, seek to limit the statutes application to only those instances where the protection of federal funds is at issue; and, it ignores its own most recent decision in *United States v. Foley*, 73 F.3d 484 (2d Cir. 1996), similarly limiting the scope of the Federal Bribery Statute.

It is obvious that Section 666 was not intended to be applied as an all encompassing anti-corruption statute. In that regard many circuit courts have limited the jurisdictional scope of 18 U.S.C. section 666 and thus, the federal government's power to prosecute state employees. *United States v. Foley*, 73 F.3d 484 (2d Cir. 1996); *United States v. Bonito*, 57 F.3d 167 (2d Cir. 1995); *United States v. Coyne*, 4 F.3d 100 (2d Cir. 1993); *United States v. Rooney*, 986 F.2d 31 (2d Cir.1993); *United States v. Cicco*, 938 F. 2d 441 (3rd Cir. 1991); *United States v. Wyncoop*, 11 F.3d 119 (9th Cir. 1993); *United States v. Valentine*, 63 F.3d 459 (6th Cir. 1995); *United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988). Recently in fact, this Court has granted certiorari in order to finally resolve what kind of cases involving state employees are subject to prosecution under section 666. *See United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), cert granted in part, sub nom, *Salinas v. United States*, __U.S.__, 65 U.S.W.L. 3504 (February 24, 1997).

Those decisions limiting the scope of criminal jurisdiction conferred under 18 U.S.C. 666 have focused much attention on the legislative history and the purpose of enacting the statute. The Report of the Senate Judiciary Committee, which is consistently cited, reiterates the "very specific" federal interest that is to be served by enacting section 666. The Report states:

> The Committee intends that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through the Federal programs from theft, fraud and undue influence by bribery. ***However, the concept is not unlimited. The term 'Federal program' means there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered.***

S.Rep. No. 225, 98th Cong., 2d Sess. 369 (1984), reprinted in USCCAN 3510, 3511. (emphasis added).

In the case presently before the Court the Government has not established the existence of a "federally funded" organization as required by the statute. The petitioner contends that while New York City, on a very broad and general governmental level, might have received the requisite federal funding, the Department of Sanitation, which was alleged to be the "protected organization," so as to satisfy the jurisdictional requirement of the statute, never did. Thus, in the petitioners view, the Second Circuit failed to apply precedential law which states that in order for a defendant to be convicted under Section 666, it must first be established that the organization in question received benefits in excess of $10,000 under a Federal program. Because the facts of this case reveal that that the alleged bribery had nothing to do with the disbursement of

or impingement upon Federal funds, prosecution under the Federal Bribery Statute, 18 U.S.C. Section 666, was improper.

In the instant case, despite the fact that the indictment alleged that petitioner "paid bribes to employees of the Department of Sanitation, an agency of the local government which receives in excess of Ten Thousand Dollars in federal assistance in one year," the testimony of Mark Schnabel, Manager of the Department of Sanitation Budget Office, revealed that DOS did not "themselves receive or administer federal funds" in order to come within the scope of section 666, and only a tenuous connection existed between the DOS and any federal funding, making prosecution under section 666 improper. Specifically, Mr. Schnabel could only testify to the fact that the DOS only received general funding from the City of New York, who in turn received general funding from the Federal Government. Without establishing that the DOS received the requisite federal funds within the meaning of section 666, the DOS could not have possibly qualified as a "federally funded organization" as proscribed by the statute. The DOS was nothing more than an "indirect beneficiary" of federal funds, which does not fall within the scope of section 666. *United States v. Wyncoop*, *supra*, 11 F.3d at p 121. As stated above, Congress did not intend for section 666 to be an all purpose corruption statute, which would encompass those briberies involving organizations that only indirectly receive federal benefits.

If the Government's theory of prosecution were accepted then section 666 would become a general federal anti-bribery statute where every state would fall within the $10,000 federal funding jurisdictional element, and thus, every state employee, every city employee and even local municipal employees would fall within the jurisdiction of the statute. This was clearly not the intended effect of the statute, as every federal contract or disbursement of funds is NOT covered under section 666. To avoid such an untenable result, legislative history and judicial interpretation have required that federal funding be shown to exist at a more specific level and not at

the general governmental level. The specificity required for prosecution under section 666 reinforces the notion that section 666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute. *See United States v. Foley*, *supra*, 73 F.3d 484; *United States v. Bonito*, *supra*, 57 F.3d 167; *United States v. Wyncoop*, *supra*, 11 F.3d 119; *United States v. Dransfield*, 913 F.Supp 702 (E.D.N.Y. 1996).

The facts in this case are the same as those in *United States v. Valentine*, 63 F.3d 459 (6th Cir. 1995). In *Valentine* the defendant worked as a Secretary/Treasurer for the water department of a Tennessee city and was charged with violating section 666. The Sixth Circuit held that section 666 required a showing that the water department, as opposed to the city government, received more than $10,000 in federal funding in a given year. In the instant case, the DOS is comparable to the water depart in *Valentine*, and as such it does not qualify as a federally funded organization under section 666 in order to confer jurisdiction upon the federal court.

Not only does the Second Circuit's decision undermine the series of decisions of other circuits limiting the scope of section 666, it also ignores its own recent decision in *United States v. Foley*, *supra*, 73 F.3d 484, wherein it similarly sought to limit the scope of the statute and held that "section 666 was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds. *Id.* at p 493. Instead, in rejecting petitioner's claim that the conviction must be vacated as the Government failed to satisfy the jurisdictional requirement of section 666, the Second Circuit relied primarily on its earlier decision in *United States v. Coyne*, *supra*, 4 F.3d 100.

In the first instance, in light of its own recent decision in *Foley*, and the series of decisions in other circuits limiting the scope of section 666, strict reliance on *Coyne* is misplaced. Moreover, the only relevant question in *Coyne* was whether section 666 further required that the requisite federal assistance received by the protected organization needed to be "earmarked" for the specific program or project to which the

criminal activity was connected as it was uncontroverted that the organization in question, the county of Albany, at all pertinent times, received the requisite Federal funding in order to satisfy the jurisdictional requirement of Section 666. Here petitioner contends that the DOS is a local City agency and a separate entity and was not, as was the case in *Coyne*, merely a separate program or project. Thus *Coyne*, is readily distinguishable from the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Certiorari be granted.

Respectfully submitted,

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350 Broadway — 10th Floor
New York, New York 10013
(212)431-8034

Appendix

SDNY-NYNY
94-CR-518
MARTIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of May, one thousand nine hundred and ninety-seven.

Present:

Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Honorable José A. Cabranes,
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAY 23, 1997
GEORGE LANGE III, CLERK

UNITED STATES OF AMERICA,

Appellee,

v.

No. 96-1523

MARK BARBIERI; ALBERT CAPONE, JR.; STEPHEN CAPONE; DOMINICK CARANO, ANTONIO CORRAGIO; JOHN COSTELLO; LOUIS DONTIS; NICHOLAS DONTIS; MICHAEL FERONE, SR.; PETER LATEMPA; STEVEN RUSSELL; JOSEPH VENDITTELLI; THOMAS VENDITTELLI; DANIEL VULPIS, SR.; DANIEL VULPIS, JR.; JOSEPH ZUCCARELLO,

Defendants,

MARCANGELO COTOIA,

Defendant-Appellant.

Appearing for Appellant:

Michael H. Handwerker, Handwerker Marchelos & Gayner, New York, New York.

Appearing for Appellee:

Roland G. Riopelle, Assistant United States Attorney, Southern District of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Martin, *Judge)*.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Marcangelo Cotoia appeals from a judgment of conviction and sentence following a jury trial before Judge Martin. Cotoia was convicted of one count of conspiring to bribe New York City Department of Sanitation ("DOS") inspectors, in violation of 18 U.S.C. § 371, and one count of bribing DOS inspectors in violation of 18 U.S.C. § 666(a)(2) & (b). He received a sentence of 33 months' imprisonment, followed by a three-year term of supervised release, and a special assessment of $100.

Cotoia argues that his conviction under 18 U.S.C. § 666 must be vacated because the evidence fails to establish that DOS was a federally funded organization, receiving in excess of $10,000 in federal funding. 18 U.S.C. § 666(b). Cotoia also challenges his sentence, arguing that the district court improperly denied a sentence reduction for acceptance of

responsibility and minor participation in the crime. We find all three claims meritless.

Section 666(b) requires that a defendant convicted under Section 666 bribe an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). Cotoia claims that the government provided evidence only of the City of New York receiving in excess of $10,000 from the federal government, but failed to show that the DOS received federal funds in excess of the amount. We disagree.

Mark Schnabel, the Manager of the DOS Budget Office, testified that in the years relevant to Cotoia's offense, the DOS received more than $7 million of federal funding each year. Cotoia argues that Schnabel's testimony is insufficient because he did not refute the fact that the City of New York first received the federal funds and then decided to allocate them to DOS. Cotoia argues that Schnabel's testimony does not establish the DOS's direct receipt of funds from the federal government. However, nothing in the statute or caselaw requires the federally funded organization to be the original recipient of federal funds. *See United Stated v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996) ("[T]he government need not trace the federal funds received by an organization to the project in connection with which its employee received a bribe"); *United States v. Coyne*, 4 F.3d 100, 108-10 (2d Cir. 1993) (bribe in connection with civic center satisfied Section 666 even though the county received no federal funds that were specifically earmarked for the civic center), *cert. denied*, 510 U.S. 1095 (1994). We therefore find the evidence sufficient to support Cotoia's conviction under Section 666.

Cotoia's claim that the district court committed clear error in denying a reduction for acceptance of responsibility, pursuant to United States Sentencing Guidelines Section 3E1.1, is also without merit. Application Note 2 of Section 3E1.1 states that this reduction does not apply to a defendant "who puts

the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Cotoia twice contested his factual guilt at trial (his first trial resulted in a hung jury) and therefore cannot benefit from this reduction. In addition, Cotoia's attempt to portray himself at sentencing as a "victim" of a ruthless business environment, again trying to minimize his guilt, further undermines his claim of acceptance of responsibility. We thus find no clear error in the district court's denial of a reduction on this basis.

Nor are we persuaded by Cotoia's contention that he should have received a reduction for being a minor participant, pursuant to Guidelines §3B1.2(b). Cotoia participated in the bribery scheme for several years, during which he dumped illegally 102 loads of improper waste at the New York City Landfill at Freshkills, in Staten Island. We find no clear error in the district court's refusal to deem Cotoia's role minor.

We therefore affirm.

/s/ Ralph K. Winter

Hon. Ralph K. Winter, U.S.C.J.

/s/ Frank X. Altimari

Hon. Frank X. Altimari, U.S.C.J.

/s/ José A. Cabranes

Hon. José A. Cabranes, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August one thousand nine hundred and ninety-seven.

USA

v.

Barbieri, et al.

Dkt No: 96-1523

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED AUG 21 1997
GEORGE LANGE III, CLERK

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Marcangelo Cotoia.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED AUG 26 1997
GEORGE LANGE III, CLERK

UNITED STATES OF AMERICA
– against –
BARBIERI ET AL.
(MARCANGELO COTOIA)
DEFENDANT-APPELLANT
Use short title

Docket No. 96-1523

NOTICE OF MOTION FOR STAYING THE MANDATE OF THIS COURT

MOTION BY:
Michael Handwerker, Esq.
HANDWERKER
MARCHELOS & GAYNER
350 Broadway — 10th Floor
New York, NY 10013
212-431-8034

Has consent of opposing counsel:
A. been sought?
Yes☒ No☐
B. been obtained?
Yes☐ No☒
Has service been effected?
Yes☒ No☐
Is oral argument desired?
Yes☐ No☒
(substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))

OPPOSING COUNSEL:
AUSA Roland Riopelle
U.S. ATTORNEYS OFFICE
Southern District of New York
One St. Andrew's Plaza
NY, NY 10007 (212)791-1974

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *(See F.R.A.P. Rule 8)*
Yes☐ No☐
Would expedited appeal eliminate need for this motion?
Yes☐ No☐
If No, explain why not:

Has argument of appeal been set:

A. by scheduling order?
Yes☒ No☐

B. by firm date of argument notice?
Yes☐ No☒

C. If Yes, enter date:

Will the parties agree to maintain the status quo until the motion is heard?
Yes☐ No☐

Judge or agency whose order is being appealed:

Brief statement of the relief requested:

Staying the issuance of the mandate of this Court and allowing the defendant-appellant an opportunity to petition the United States Supreme Court for a writ of certiorari due to a split in the circuits on the legal issue in question.

Complete Page 2 of this Form

By: (signature of attorney)
/s/
Signed name must be printed beneath
MICHAEL HANDWERKER, ESQ.

Appearing for:
(Name of Party)
Defendant
8/25/97

IT IS HEREBY ORDERED that the motion be and it hereby is granted ~~denied~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED SEP 11 1997
GEORGE LANGE III, CLERK